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No. 02-572

IN THE
Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

On January 13, 2003, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. The Solicitor General's response argues (1) that the court of appeals correctly resolved each of the three Questions Presented in the petition, (2) that this Court nevertheless should grant certiorari to settle and clarify the law on each point, and (3) that the specific characteristics of this case weigh against granting the particular discovery requested here.

1. Respondent Advanced Micro Devices ("AMD") of course agrees with the United States that the decision below was correct and that AMD should prevail on the merits with respect to the questions raised in the petition.

2. Given the position of the United States, AMD also withdraws its opposition to certiorari. AMD believes a grant of certiorari would mitigate the risk that the underlying matter might become moot through delay. *Accord* Intel Reply Br. 10. AMD's application for discovery has now been pending for more than two years. The European Commission ("Commission") investigation to which that application relates has been pending for three years. As AMD has explained, the application is designed to obtain information for AMD to submit to the Commission for use either in a proceeding on a Statement of Objections against Intel or in a proceeding by AMD against the Commission in the European Community courts for failure to act against Intel. AMD Opp. 4-5, 18 n.8, 20 n.9. The United States correctly notes, however, that if AMD does not obtain the information before the Commission closes the investigative stage of the proceeding, neither AMD nor the Community courts will be able to rely on it in subsequent proceedings. SG Br. 19 & n.7. It is in AMD's interest to obtain an expeditious resolution of this § 1782 dispute so that any information obtained may be timely submitted to the EC.

While AMD previously urged this Court to deny review in this case at least until there is a final discovery order, the views expressed by the Solicitor General favoring certiorari increase the likelihood that this Court will grant review at one point or another. AMD believes that if issues raised by Intel are to be resolved by this Court, they should be resolved sooner, rather than later.

3. AMD strongly disagrees, however, with the Solicitor General's suggestion that although the district court has the *discretion* to issue the discovery requested in this case, "the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion." SG Br. 18. The "characteristics" identified by the Solicitor General are that the current proceeding is an investigation, *id.*, and that "the Commission's amicus brief suggests that the Commission, which is capable itself of invoking Section 1782, does not need or want the district court's assistance" in that investigation, *id.* at 19. This view is premised on a misunderstanding both of the Commission's position in this case and of the purpose of AMD's discovery request.

a. As an initial matter, the Commission's brief does not necessarily demonstrate that the Commission "does not need or want" the information AMD seeks to discover. It would be unlikely for the Commission to take such a position, given that its regulatory mandate *requires* it to consider any evidence submitted by a complainant. *See infra* at 3. In fact, the Commission's brief makes clear that its purpose here is institutional, relating solely to its "interest in ensuring the continued proper functioning of its antitrust enforcement program," EC Br. 3, and specifically its Leniency Program, *id.* at 6-7. The Commission explicitly states that "the filing of this *amicus* brief in no way reflects support by the European Commission of the merits of the underlying claims made by either party to this proceeding." EC Br. 3. The Commission's brief does confirm that the Commission itself

has not sought the requested documents, but that fact only sets up the question here, it does not answer it.

b. If the Commission's brief *did* evince a precommitment not to examine any evidence produced in response to AMD's discovery request, as the Solicitor General apparently believes it does, that would only militate *in favor* of granting the request. The Solicitor General's suggestion to the contrary misapprehends the way the requested discovery would be used in the European proceedings.

The rights and procedures of the Commission and of European Community courts are in many ways quite different from ours. As the Solicitor General acknowledges, a complainant has the legal right to submit evidence to the Commission in support of its complaint. SG Br. 18. This right is vital, because the Commission, like most enforcement agencies, has limited resources. Thus, its interest in pursuing certain investigative avenues may easily be, and often is, a matter of resource limitations or administrative priorities. This is why European practice does not leave a complainant subject to the vagaries of the Commission's interest in information, but, instead, imposes on the Commission the *legal obligation* to examine and consider any evidence submitted by a complainant:

> [A]lthough the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation 99/63 [now Regulation 2842/98] oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such kind as to distort competition in the Common Market and affect trade between the member-States . . . .

Case T-24/90, *Automec Srl v. Commission*, 1992 E.C.R. II-2223, 5 C.M.L.R. 431, 478 (1992). Further, if the Commis-

sion preliminarily decides not to proceed, it must provide the complainant an "Article Six letter" and allow the complainant to respond. *Id.* at 476-77. "The purpose of that intermediate phase in the administrative procedure before the Commission is, in fact, to safeguard the rights of the complainant, to whom an unfavourable decision should not be addressed without first giving him the opportunity to submit observations on the grounds upon which the Commission intends to rely." Case C-282/95P, *Guerin Automobiles v. Commission*, 1997 E.C.R. I-1503, 5 C.M.L.R. 447, 481 (1997).

Once that intermediate stage is complete, the Commission *must* either reject the complaint or initiate an action against the subject of the complaint. *Id.* If it initiates an action, "the complainant is entitled to participate." *Id.* If the Commission rejects the complaint, that decision may be "the subject-matter of an action [by the complainant] for annulment before the Community courts." *Id.* In that action, the Community courts will rely on evidence submitted by the complainant during the investigative stage to determine "first, whether the Commission has carried out the examination of the complaint which it is required to do by evaluating with all the requisite care the factual and legal aspects adduced by the applicant in his complaint." *Automec Srl*, 5 C.M.L.R. at 478.

Accordingly, no matter what the Commission in this case ultimately decides, the evidence AMD seeks to submit *will* be "use[d]" in a "proceeding" before a "foreign tribunal."

The Solicitor General does not contend otherwise, *see* SG Br. 19 (agreeing that discovery obtained from Intel by AMD would be used by AMD in proceeding before foreign tribunal the meaning of § 1782), but nevertheless suggests that the district court should consider, as "weigh[ing] against" discovery here, the supposed fact (*but see supra* at 2) that the Commission "does not need or want the district court's assistance." SG Br. 19. This is quite wrong.

First, since neither the court nor the Commission can possibly know what the Commission might actually "need" without having the information to evaluate, this factor cannot seriously weigh against disclosure of the information. Second, what the Commission might "want" is simply beside the point. As noted above, the Commission is *required* by European Community law to consider any evidence submitted by the complainant during the investigative stage, whether the Commission wants to look at it or not. Equally important, because the evidence is required to be a part of the Commission's analysis, if the Commission decides not to proceed, the complainant has the right to use the evidence in an action *against* the Commission contending that an action against Intel should have been taken. And European Community courts of review will rely on such evidence in determining whether the Commission acted properly in declining to proceed. There is no basis in European procedure for the Commission itself to curtail the courts' access to a complete record.

Indeed, if the Commission negatively prejudges the value or relevance of evidence a party seeks to submit, it is all the *more* imperative that the record be completed so that the Commission's decision can be adequately reviewed. As we have seen, one of the main reasons a complainant such as AMD is allowed to participate in Commission proceedings is to help create the factual record so that the courts can tell whether the Commission has fulfilled its duties. Thus if the Commission itself will not "use" the evidence it is even more certain that AMD and the European Community courts *will* use it, underscoring the importance of granting the discovery request. In short, any suggestion that the Commission does not want or need the evidence sought by AMD only weighs *in favor* of granting the request.[1]

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[1] This contrasts with the relevance of the Commission's views on, for example, the risks a given § 1782 discovery request might pose to the

CONCLUSION

For the foregoing reasons, the petition should be granted. This Court should affirm the judgment below with respect the legal issues presented in the petition and should reject the Solicitor General's suggestion that the particular characteristics of this case weigh against granting the discovery requested.

Respectfully submitted,

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Commission's Leniency Program. AMD agrees with the Solicitor General that the Commission's views as to the potentially harmful effects of a given discovery request on the Leniency Program would be relevant to a district court's exercise of discretion over the request. *Compare* AMD Opp. 13-14 *with* SG Br. 14. In this case, however, nobody disputes that AMD's request does *not* seek or implicate Leniency Program documents. AMD Opp. 13; Intel Reply Br. 8.